

Your Surrogate will end up keeping the baby, won't she?

So many clients tell us that this is the question they are asked when they tell their friends – and even their fertility doctors – that they are considering surrogacy. Is it true? Are surrogacy arrangements in the UK very risky, with the surrogate mother holding all the cards and having an absolute right to keep the baby? Do those who embark on surrogacy arrangements frequently end up with the surrogate mother keeping the child in practice?

It is certainly a widespread belief, and is one of the factors we see driving people abroad for surrogacy, to destinations like the USA, the Ukraine and India, where intended parents have clear and enforceable rights. However, going abroad for surrogacy can be complicated, logistically and ethically, but also legally. Whatever the foreign law says, UK law still treats the foreign surrogate as the mother (and her husband as the father). The parents have to deal with the immigration authorities to get their child home, which is not always easy and can involve a long stay outside the UK with a newborn. Once they get home, they also need to apply to the court here to become the legal parents under UK law, and the court process involves detailed High Court scrutiny if (as is typically the case) the surrogacy has been paid for.

There are lots of reasons why parents go abroad for surrogacy, but a UK surrogate keeping the baby may not in practice be as big a risk as people think. Yes, under UK law the surrogate remains the mother and has to agree to give up that status after the birth (which actually is the case wherever in the world the arrangement takes place). And yes, surrogacy agreements are not enforceable contracts under UK law if things go wrong, but in the rare cases where things have gone badly wrong in the UK, it has been up to the court (and not the surrogate) to decide what should happen.

In practice, there have been two reported cases dealing with surrogacy arrangements in the UK which have broken down. In the first, in 2007, a surrogate (who was the biological mother) had conceived through home insemination with the intended father's sperm. The surrogate had deceived the parents, telling them she had miscarried when she had not. The intended parents applied to the court for help and, notwithstanding that surrogacy arrangements are in theory unenforceable, the court awarded care to the intended parents.

In the second case, from 2010, a couple had entered into an informal surrogacy arrangement with a woman they had met on the internet, with no written agreement, no clinic and



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no agency involved. The surrogate was the biological mother and the court, finding that she had bonded with the baby after the birth (and noting that all the parties had lied to the court about various aspects of what had happened), decided that the child's welfare was best served in her care. This is the only reported case in UK law of a surrogate mother being awarded custody.

The fact that these two cases had opposite outcomes shows, ultimately, that the courts have very flexible powers to determine what is in the child's best interests where surrogacy does go wrong. It is a position which is rather different than the more common belief that the surrogate holds all the cards, but what is really interesting is that in practice, the courts have so rarely needed to make these kinds of decisions. These two cases are the only reported cases of surrogacy arrangements going wrong, contrasted with many hundreds of successful orders made ratifying surrogacy arrangements after the birth.

So why have surrogacy arrangements in the UK so rarely gone wrong? My experience is that surrogates and parents typically go into surrogacy arrangements with care and planning, and invest significantly in their relationship. These are not situations which are taken lightly or given little thought. While the law may not reflect this, everyone's understanding is usually very clear that the parents are the parents from the outset, and that everyone is working toward a common goal. It may not be good tabloid fodder, but the proof is in the pudding, and in how rarely surrogacy cases come to court because a surrogate has refused to hand over the baby. The boring but happy truth is that surrogacy in the UK far more often ends up in a lifelong friendship than in a custody dispute.

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